INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI:

Summary Statement 2
Opinions Below 3
Jurisdiction 4
Questions Presented 4
Applicable Rules and Statutes 5
Reasons for Granting Writ 5
Conclusion 6

BRIEF FOR PETITIONERS:

POINT I—*Res judicata* and estoppel must be affirmatively pleaded 7

POINT II—The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with decisions of the Circuit Court of Appeals for the Tenth Circuit on the same matter..... 9

POINT III—The New York Surrogate's Court had no jurisdiction to determine the issue in this action, therefore, *res judicata* or estoppel is not a bar to this case 10

APPENDIX A 15

APPENDIX B 16

TABLE OF CASES CITED:

Bates v. *Bodie*, 245 U. S. 520 ..... 7, 8
Bowles v. *Capitol Packing Co.*, 143 F. (2d) 87 (Circuit Court of Appeals, Tenth Circuit, 1944)..... 10
Dioguardi v. *Durning*, 139 F. (2d) 774 (2nd C. C. A.) 9n

PAGE

Erk, Tahir v. *Glenn L. Martin,* 116 F. (2d) 865 (4th C. C. A.) 9n

Kalik, Matter of, 178 Misc. 607 (N. Y. County Surr. Ct., 1942) 11

Krasnofsky, Matter of, 157 Misc. 759 (N. Y. County Surr. Ct., 1936) 11, 12

Leblang, Matter of, 159 Misc. 322 (N. Y. County Surr. Ct., 1936) 11

Raymond v. *Davis' Estate,* 248 N. Y. 67 12

Sherrer v. *Sherrer* (decided by this Court June 7, 1948, not yet officially reported, No. 36 October Term 1947, 16 The United States Law Week, p. 4538) 8

Simonson, Matter of, 271 App. Div. 420 (N. Y., 1946). 11

Thomas, Matter of, 235 App. Div. 450 (N. Y., 1932).. 11

Topping v. *Fry,* 147 F. (2d) 715 (7th C. C. A.)..... 9n

Zeligson v. *Hartman-Blair, Inc.,* 135 F. (2d) 874 (Circuit Court of Appeals, Tenth Circuit, 1943).....9, 10

OTHER AUTHORITIES CITED:

Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347(a)), Section 240(a)..... 4

Rules of Civil Procedure:

Rule 8(c) 4, 5, 7, 10, 15

Rule 12(b)6 .....2, 5, 7, 15

Rule 12(b)6 as amended March 19, 1947 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .

MARION A. HART; FRANK C. HART, JR.; JAMES A. HART, an infant by Marion A. Hart, his Guardian; KERRY ANN HART, an infant by Marion A. Hart, her Guardian; and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Depositary for Marion A. Hart, Frank C. Hart, Jr., James A. Hart and Kerry Ann Hart,

Petitioners,

—against—

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEWARK, NEW JERSEY, a corporation of the State of New Jersey,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Petitioners Marion A. Hart, *et al.* respectfully pray for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of said Court dated March 10, 1948 affirming a judgment of the United States District Court, Southern District of New York, dismissing the complaint of Petitioners-Plaintiffs on the ground that

the complaint failed to state a claim against Respondent-Defendant on which relief can be granted.

Summary Statement.

Petitioners brought this action against Respondent in the United States District Court, Southern District of New York, to recover $16,111.79 as interest on the proceeds of two policies of insurance on the life of Frank C. Hart, deceased husband of Petitioner Marion A. Hart and father of the other individual Petitioners. Jurisdiction of the Federal Court was invoked because of diversity of citizenship.

Respondent paid Petitioners the face amount of both policies 7 years after the death of said insured. Respondent had the use and benefit of the proceeds of both policies for 7 years but paid interest only for 1 year at 3¼%. Petitioners claim interest at 6% per annum for the 7 years between the date of death and the date of payment.[1]

Before Respondent served an answer it moved to dismiss the complaint pursuant to Rule 12(b)6 of the Rules of Civil Procedure contending that the complaint failed to state a claim against Respondent on which relief can be granted. No affidavit was submitted on Respondent's motion and it was based solely on the complaint and the exhibits attached thereto and incorporated therein by reference and these were a decree of the New York Surrogate's Court and the settlement agreement upon which said decree was made. Respondent's motion was granted and the complaint dismissed.

The District Court rendered an opinion holding, among other things, that a decree of the New York Surrogate's Court in a prior proceeding dated De-

[1] R. 2-12.

cember 30, 1942 estopped Petitioners from maintaining this action.[2] The Circuit Court of Appeals in unanimously affirming the District Court rendered an opinion[3] holding that there was no remedy available to Petitioners in the Federal Court because of a prior proceeding in the New York Surrogate's Court; in effect the court below held the decree in the Surrogate's Court was *res judicata* and estopped Petitioners from maintaining this action.

The District Court and the Circuit Court of Appeals relied upon a decree in a prior proceeding of the New York Surrogate's Court dated December 30, 1942 in the matter of the administration of the Estate of Frank C. Hart, deceased, the insured covered by the policies. A copy of such decree is annexed to the complaint.[4] Said Surrogate's Court proceeding was instituted for purpose of obtaining a decree that Petitioners herein rather than the Estate of the deceased insured were entitled to the proceeds of various policies of insurance issued by Respondent and others. The Surrogate's decree provided Petitioners were entitled to the proceeds of the policies.

However, none of the pleadings in the said Surrogate's Court proceeding was attached to the complaint and hence was not before the court below or the District Court.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit dated March 10, 1948 is in the Record at pages 50-59, and reported in 166 F. (2d) 891.

---

[2] R. 43-44.
[3] R. 50-59.
[4] R. 24-32.

The opinion of the District Court dated April 3, 1947 is in the Record at pages 34-44 but is not officially reported.

Petitioners asked the Circuit Court of Appeals for a rehearing which was unanimously denied without opinion May 27, 1948.[5]

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347(a)). The judgment of the Circuit Court of Appeals for the Second Circuit to be reviewed is dated March 10, 1948.

By an order of this Court dated May 24, 1948 (by Mr. Justice Robert H. Jackson) the time of Petitioners to file this petition was extended to August 9, 1948.[6]

Questions Presented.

1. Is *res judicata* or estoppel an absolute bar to Petitioners' cause of action on a motion addressed to the sufficiency of the complaint under Rule 12(b)6 before answer, where none of the pleadings in the prior proceeding was before the court and where the complaint on its face does not indicate facts sufficient to establish *res judicata* or estoppel, in view of Rule 8(c) of the Rules of Civil Procedure?

2. Are Petitioners estopped from seeking relief in the Federal Court, where it is well settled that the

[5] R. 60.
[6] R. 62.

New York Surrogate's Court had no jurisdiction to determine the amount of interest on the policies which is the subject of this action?

Applicable Rules and Statutes.

Rules 8(c) and 12(b)6 of the Rules of Civil Procedure for the District Courts of the United States are relevant on this petition and the pertinent provisions thereof are set forth in Appendix A (*infra*) page 15. There is no statute relevant on this application.

Reasons for Granting Writ.

1. The Circuit Court of Appeals for the Second Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in that the lower court determined Petitioners' action is barred by estoppel and *res judicata* even though neither of these affirmative defenses was pleaded as required by Rule 8(c) (see Point I, *infra*).

2. The Circuit Court of Appeals for the Second Circuit has rendered a decision in conflict with decisions of the Circuit Court of Appeals for the Tenth Circuit on the same matter (see Point II, *infra*).

3. The Circuit Court of Appeals has decided an important question of federal law, as to whether *res judicata* and estoppel must be affirmatively pleaded, which has not been, but should be, settled by this Court (see Point II, *infra*).

4. The Circuit Court of Appeals has decided an important question of local law in conflict with applicable local decisions (see Point III, *infra*).

5. Judge Augustus N. Hand of the Circuit Court of Appeals for the Second Circuit who was the presiding Judge of said Court on the appeal to that Court, stated in open Court on the argument of a motion of Petitioners to stay the entry of order on mandate subsequent to the decision of that Court, that Petitioners should bring this case before the Supreme Court as there was some doubt as to issues presented.

Conclusion.

Wherefore, Petitioners respectfully pray that a Writ of Certiorari be issued to the United States Circuit Court of Appeals for the Second Circuit to the end that this case may be reviewed and determined by this Court.

Dated, New York, N. Y., July 30, 1948.

Respectfully submitted,

Lawrence R. Condon,
Attorney for Petitioners,
165 Broadway,
New York 6, N. Y.

BRIEF FOR PETITIONERS.

POINT I.

***Res judicata* and estoppel must be affirmatively pleaded.**

Res judicata and estoppel are affirmative defenses under Rule 8(c) of the Rules of Civil Procedure and as such should not be considered on a motion to dismiss under Rule 12(b)6.

The pleadings in the New York Surrogate's Court prior proceeding were not before the court below. Only the decree and the settlement agreement in that proceeding were incorporated in the complaint. There is nothing on the face of the complaint or in said decree to warrant the summary determination made by the court below that Petitioners are barred by *res judicata* or estoppel.

The court below in its opinion did not characterize the decree of the New York Surrogate's Court as *res judicata* but the effect of its opinion and decision was that Petitioners are estopped because the decree of the New York Surrogate's Court was *res judicata.*

In *Bates* v. *Bodie,* 245 U. S. 520, at page 526, this Court stated:

> "* * * If the second action was upon a different claim or demand, then the judgment is an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' (Citing cases.)

> "But how find the matters in issue or the points controverted upon the determination of which the judgment was rendered? The obvious answer would seem to be that for the issues we must go to the pleadings; for the response to them and their determination, to the judgment; and each may furnish a definition of the other."

In *Sherrer* v. *Sherrer* (decided by this Court June 7, 1948, not yet officially reported, No. 36 October Term 1947, 16 The United States Law Week, p. 4538) this Court stated:

> "* * * Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate."

Petitioners "were not given a full opportunity to litigate" in the New York Surrogate's Court the issue presented by this case, that is, as to the amount of interest Petitioners are entitled to recover on the policies. The Surrogate's Court decree discloses, on careful analysis, that said court did not pass on such issue. As stated in Point III (*infra*) the Surrogate's Court expressly authorized this suit against Respondent for interest. Furthermore as argued under Point III (*infra*) the New York Surrogate's Court had no jurisdiction to determine the amount of interest due from Respondent.

On motions addressed to a complaint all reasonable inferences should be drawn in favor of the pleading

attacked.[7] However, the court below erroneously resolved all inferences against the complaint.

The court below erred in determining Petitioners are estopped by the prior proceeding as the pleadings in such proceeding were not before the court, and especially as the conclusions reached by the court below as to the effect of said prior proceeding are erroneous and without foundation. Hence the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

POINT II.

The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with decisions of the Circuit Court of Appeals for the Tenth Circuit on the same matter.

In this case the Circuit Court of Appeals for the Second Circuit held that Petitioners are barred because of estoppel and *res judicata,* although no affirmative defense was pleaded.

Zeligson v. *Hartman-Blair, Inc.,* 135 F. (2d) 874 (Circuit Court of Appeals, Tenth Circuit, 1943), held that *res judicata* must be affirmatively pleaded under Rule 8(c) of the Rules of Civil Procedure and that such defense may not be raised on a motion addressed to the sufficiency of the complaint. There the court at page 876 stated the rule:

> "* * * No doubt that judgment (in a prior action) will present itself as a barrier at some

[7] *Dioguardi* v. *Durning,* 139 F. (2d) 774 (2nd C. C. A.); *Tahir Erk* v. *Glenn L. Martin,* 116 F. (2d) 865 (4th C. C. A.); *Topping* v. *Fry,* 147 F. (2d) 715 (7th C. C. A.).

stage of this case, but whether plaintiff can hurdle it cannot be determined on a motion directed to the sufficiency of the complaint. *Res judicata*, estoppel, or any other matter constituting an avoidance or affirmative defense must be affirmatively pleaded. Rule 8c, Rules of Civil Procedure, 28 U. S. C. A. following section 723c. Such defenses may not be raised by a motion addressed to the sufficiency of the complaint."

Bowles v. *Capitol Packing Co.*, 143 F. (2d) 87 (Circuit Court of Appeals, Tenth Circuit, 1944), held that estoppel must be affirmatively pleaded otherwise it cannot be considered.

The decision of the court below in holding that Petitioners are barred though the bases thereof are not pleaded and do not appear on the face of the complaint, is in conflict with the above decisions of the Circuit Court of Appeals for the Tenth Circuit.

This Court has not passed on this important question of federal law, as to the necessity of affirmatively pleading *res judicata* and estoppel under Rule 8(c), and it should be settled by this Court, especially in view of the conflict between the Tenth Circuit and Second Circuit on the same matter.

POINT III.

The New York Surrogate's Court had no jurisdiction to determine the issue in this action, therefore, *res judicata* or estoppel is not a bar to this case.

The issue in this case as to the amount of interest Petitioners are entitled to recover relates solely to rights under a contract of insurance between living persons. The decree of the Surrogate's Court dated December 30, 1942 held that the policies belonged to

Petitioners herein.[8] The amount of interest on the proceeds of the policies due Petitioners does not relate to any problem concerning the administration of the Estate of any deceased person.

This action is between living persons on a simple contract. The estate of the deceased insured has no interest in this case. It is well settled by numerous decisions in New York that the Surrogate's Court has no jurisdiction of a proceeding to collect a simple debt or to enforce a purely contractual obligation between living persons.

Matter of Simonson, 271 App. Div. 420 (N. Y., 1946);
Matter of Thomas, 235 App. Div. 450 (N. Y., 1932);
Matter of Kalik, 178 Misc. 607 (N. Y. County Surr. Ct., 1942);
Matter of Krasnofsky, 157 Misc. 759 (N. Y. County Surr. Ct., 1936);
Matter of Leblang, 159 Misc. 322 (N. Y. County Surr. Ct., 1936).

Matter of Krasnofsky, supra, presented a similar issue as to the jurisdiction of the New York Surrogate's Court. The question arose in that case as to the ownership of policies of insurance. The Surrogate held that a collateral claim of the insurance company was not subject to the jurisdiction of the Surrogate and remitted the parties to another forum. At page 760 the Surrogate of New York County stated:

"* * * When a determination is reached that the estate has no interest in the property or its

[8] R. 30.

> proceeds, our jurisdiction ends and we may not decide the conflicting claims of the various respondents as between themselves. (*Matter of Brennan*, 129 Misc. 283; *Isaacs* v. *Isaacs*, 208 App. Div. 61; *Matter of Thomas*, 235 id. 450.) The determination of these questions must be had in some other forum. * * *"

The cases above cited limiting the Surrogate's Court jurisdiction were decided subsequent to a 1921 legislative amendment enlarging the powers of the New York Surrogate's Court and they were decided subsequent to *Raymond* v. *Davis' Estate*, 248 N. Y. 67, relied on by the court below.[9]

Raymond v. *Davis' Estate, supra*, cited by the court below as to the jurisdiction of the Surrogate is wholly inapplicable. In that case the New York Court of Appeals held that the Surrogate's Court had jurisdiction to order the liquidation of the partnership where one of the partners had died. The reason therefor is obvious, as that case involved the administration of the Estate of a deceased person. There is no such problem present in this case.

The decree of the Surrogate which was before the court below was dated December 30, 1942. A subsequent decree of the New York Surrogate's Court dated December 23, 1943 was not before the District Court or the Circuit Court of Appeals on appeal of Petitioners. However, said subsequent decree dated December 23, 1943 was submitted by Petitioners to the Circuit Court of Appeals with their petition for rehearing. A copy thereof is set forth in Appendix B,

---

[9] R. 56, 58, 59.

infra, pages 16-35, and this Court is asked to take judicial notice thereof. Said latter decree specifically authorized suit against Respondent on account of the claim for interest which is the subject of this action, in the following language:

> "And it appearing from the affidavit of V. L. Banker, verified July 13, 1943, that the said depositary has a claim against The Mutual Life Insurance Company of Newark in the sum of $16,111.79 for interest on monies held by the said Insurance Company representing the proceeds of the policies numbered 1203896 and 1429358 issued by the said Insurance Company for the period from the date of the death of the said decedent to the 12th day of January, 1943."[10]
>
> * * *
>
> "ORDERED, ADJUDGED AND DECREED that the said executors and The Chase National Bank of the City of New York * * * be and it hereby is authorized to bring suit against the said Mutual Life Insurance Company of Newark, New Jersey, on account of the said claim for interest on the policies numbered 1203896 and 1429358 issued by the said Insurance Company and in connection therewith, the executors and the said depositary are hereby authorized to take such proceedings as to them may seem proper, advisable or expedient, in court or otherwise to compromise, adjust and/or to submit to arbitration the said claim * * *."[11]

This latter decree is proof that the Surrogate's Court did not determine the amount of interest due

---

[10] Pp. 27, 28, *infra.*
[11] P. 34, *infra.*

to Petitioners and that the said court had no jurisdiction to decide such issue.

The Circuit Court of Appeals erred in deciding that the New York Surrogate's Court determined that the Surrogate's Court had jurisdiction of the above discussed subject matter of this action. The court below has decided an important question of local law in conflict with applicable decisions affecting the jurisdiction of the New York Surrogate's Court.

Dated, New York, N. Y., July 30, 1948.

Respectfully submitted,

LAWRENCE R. CONDON,
Attorney for Petitioners,
Office & P. O. Address,
165 Broadway,
New York 6, N. Y.

APPENDIX A.

Pertinent provisions of Rules 8(c) and 12(b)6 of Rules of Civil Procedure for the District Courts of the United States:

"RULE 8. GENERAL RULES OF PLEADING.

* * * *

(c) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively * * * estoppel, * * * *res judicata,* * * * and any other matter constituting an avoidance or affirmative defense. * * *"

"RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION —MOTION FOR JUDGMENT ON PLEADINGS.

* * * *

(b) HOW PRESENTED. * * * the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted. * * *"

The amendment to Rule 12(b)6 which took effect March 19, 1947 is not applicable here for 2 reasons: (1) Such amendment became effective subsequent to the hearing on Respondent's motion to dismiss; and (2) no matters outside the complaint and the exhibits attached thereto and incorporated therein were presented to the Court.

Said amendment to Rule 12(b)6 reads as follows:

"If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

APPENDIX B.

DECREE IN CONSOLIDATED PROCEEDINGS.

ACCOUNTING AND APPLICATIONS FOR ATTORNEYS' FEES.

At a Surrogate's Court, held in and for the County of New York, at the Hall of Records in said County on the 23rd day of December, 1943.

Present—HON. JAMES A. FOLEY, *Surrogate.*

In the Matter

of the

Judicial Settlement of the Account of Proceedings of Herbert V. Peterson, H. Victor Crawford, and The Chase National Bank of the City of New York, as Executors of the Last Will and Testament of Frank C. Hart, deceased and of The Chase National Bank of the City of New York, as Depositary of the proceeds of Certain Insurance Policies on the life of

FRANK C. HART,

Deceased.

In the Matter of the Petition of SYDNEY G. SOONS, for the fixing and determination of the compensation payable to Davies, Auerbach, Cornell & Hardy, as attorneys, from the estate of

FRANK C. HART,

Deceased,

or from funds in the hands of the Executors of his Will belonging to legatees or distributees thereof.

In the Matter of the Petition of Lawrence R. Condon for the fixing and determination of the compensation payable to him as attorney, from the Estate of

FRANK C. HART,

Deceased,

or from funds in the hands of the Executors of his Will belonging to legatees or distributees thereof.

Herbert V. Peterson, H. Victor Crawford and The Chase National Bank of the City of New York, having heretofore made application for the judicial settlement of the account of proceedings of the said executors for the period from the 18th day of July, 1941 to the 23rd day of February, 1943, and The Chase National Bank of the City of New York, as Depositary under two certain orders of the Surrogate's Court of New York County dated April 24, 1936 and June 21, 1937, respectively, and under a compromise agreement dated December 31, 1941, as amended by a certain agreement dated December 7, 1942, and approved by the Surrogate's Court of New York County by decree dated December 30, 1942, having made application to the said Surrogate's Court for the judicial settlement of this account as such Depositary for the period from the 18th day of July, 1941 to February 23, 1943, and a citation having been issued pursuant to statute directed to Marion A. Hart, Muriel Constance Warburg, Frank C. Hart, Jr., James A. Hart, Kerry Ann Hart, Mathilde Marguet, as Executrix of the Last Will and Testament of Louis G. Marguet, M. C. Carlin, Lawrence R. Condon, Davies, Auerbach, Cornell & Hardy, Crawford and Sprague, Milbank, Tweed & Hope, and Emmanuel Lewin, citing them and each of them to show cause before the Surrogate's Court of New York County to be held at the Hall of Records in said County on the 1st day of June, 1943, at 10:30 o'clock in the forenoon of that day: (1) why the final account of Herbert V. Peterson, H. Victor Crawford and The Chase National Bank of the City of New York, as Executors of the Last Will and Testament of the said Frank C. Hart, deceased, should not be judicially settled and allowed; and why the account of The Chase National Bank of the City of New York as depositary under the compromise agreement dated December 31, 1941, as amended by the agreement of December 7, 1942, and under two certain orders of this Court dated April 24, 1936 and June 21, 1937, respectively, should not be judicially settled and allowed; (2) why the controversy between Mathilde

Marguet as Executrix of the Last Will and Testament of Louis G. Marguet, deceased, and M. C. Carlin should not be settled and why it should not be determined which of the two said persons is entitled to the sum of $98.38; (3) why a determination should not be made as to the disposition of the $5,000 deposit made by Muriel Hart Warburg with the Executors pursuant to the instrument in writing signed by her on May 31, 1939; (4) why the Court should not approve and direct the payment of commissions to Herbert V. Peterson and H. Victor Crawford as Executors of the Last Will and Testament of Frank C. Hart, deceased, and to The Chase National Bank of the City of New York as temporary administrator of the Estate and as Executor of the Last Will and Testament of Frank C. Hart, deceased, in accordance with the computation of commissions due as shown by Schedule K of the account filed in this proceeding; (5) why the decree to be made herein should not direct the payment of the sum of $12,000 out of the funds in the hands of the Executors in payment of attorneys' fees as agreed by the Executors of the Last Will and Testament of Frank C. Hart, deceased, to Milbank, Tweed & Hope; (6) why the decree to be made herein should not fix the attorneys' fees of Crawford and Sprague in the sum of $17,500 and direct that the balance of the fees due the said firm in the sum of $5,532.24 be paid out of the funds in the hands of the Executors; (7) why the Court should not approve the reservation of $12,000 to cover taxes that may be assessed against the Executors; and (8) why such other and further relief as to the Court might seem just and proper should not be granted to the petitioners; and the said citation having been returned with proof of due service thereof upon Marion A. Hart, Muriel Constance Warburg, James A. Hart, Kerry Ann Hart, Mathilde Marguet, as Executrix of the Last Will and Testament of Louis G. Marguet, M. C. Carlin, Lawrence R. Condon, Davies, Auerbach, Cornell & Hardy, Crawford and Sprague, Milbank, Tweed & Hope, and Emmanuel Lewin, and a supplemental citation

having been issued out of the said Surrogate's Court directed to the said Frank C. Hart, Jr. citing him to show cause before the Surrogate's Court of New York County, to be held at the Hall of Records in said County on the 8th day of June, 1943, at 10:30 o'clock in the forenoon of that day: (1) why the final account of Herbert V. Peterson, H. Victor Crawford and The Chase National Bank of the City of New York, as Executors of the Last Will and Testament of the said Frank C. Hart, deceased, should not be judicially settled and allowed; and why the account of The Chase National Bank of the City of New York as depositary under the compromise agreement dated December 31, 1941, as amended by the agreement of December 7, 1942, and under two certain orders of this Court dated April 24, 1936 and June 21, 1937, respectively, should not be judicially settled and allowed; (2) why the controversy between Mathilde Marguet as Executrix of the Last Will and Testament of Louis G. Marguet, deceased, and M. C. Carlin should not be settled and why it should not be determined which of the two said persons is entitled to the sum of $98.38; (3) why a determination should not be made as to the disposition of the $5,000 deposit made by Muriel Hart Warburg with the Executors pursuant to the instrument in writing signed by her on May 31, 1939; (4) why the Court should not approve and direct the payment of commissions to Herbert V. Peterson and H. Victor Crawford as Executors of the Last Will and Testament of Frank C. Hart, deceased, and to The Chase National Bank of the City of New York as temporary administrator of the Estate and as Executor of the Last Will and Testament of Frank C. Hart, deceased, in accordance with the computation of commissions due as shown by Schedule K of the account filed in this proceeding; (5) why the decree to be made herein should not direct the payment of the sum of $12,000 out of the funds in the hands of the Executors in payment of attorneys' fees as agreed by the Executors of the Last Will and Testament of Frank C. Hart, deceased, to Milbank, Tweed

& Hope; (6) why the decree to be made herein should not fix the attorneys' fees of Crawford and Sprague in the sum of $17,500 and direct that the balance of the fees due the said firm in the sum of $5,532.24 be paid out of the funds in the hands of the Executors; (7) why the Court should not approve the reservation of $12,000 to cover taxes that may be assessed against the Executors; and (8) why such other and further relief as to the Court might seem just and proper should not be granted to the petitioners, and Mathilde Marguet, as Executrix of the Last Will and Testament of Louis G. Marguet, deceased, having appeared herein by Frederick Hamisch, Esq., her attorney, and the said Muriel Constance Warburg having appeared herein by Emmanuel Lewin, Esq., her attorney, and the said Emmanuel Lewin having appeared on the return date of the said citation and supplemental citation and having filed herein his affidavit verified June 7, 1943, and the affidavit of Muriel Constance Warburg verified June 7, 1943 and Maxwell C. Carlin, named in the citation herein as M. C. Carlin, having appeared personally by a stipulation duly signed by him and by the said Frederick Hamisch as attorney for the said Mathilde Marguet, as Executrix of the Last Will and Testament of Louis G. Marguet, deceased, and the said stipulation having provided that the controversy between the said Mathilde Marguet as such Executrix and the said Maxwell C. Carlin as to the ownership of the sum of $98.38 be compromised by the payment of the sum of $25.00 to Mathilde Marguet as Executrix, and the sum of $73.38 to the said Maxwell C. Carlin, and Messrs. Davies, Auerbach, Cornell & Hardy having appeared *pro se* on the return date of the said citation and John F. Keating having been designated to receive the citation in the said proceeding on behalf of Frank C. Hart, Jr., James C. Hart and Kerry Ann Hart and thereafter the said citation having been duly served on the said John F. Keating, as provided in the order designating him to receive such citation, and Sydney G. Soons

having filed a petition directed to Marion A. Hart, Frank Charles Hart, Jr., an infant over the age of fourteen years, James A. Hart, an infant over the age of fourteen years, Kerry Ann Hart, an infant under the age of fourteen years, Herbert V. Peterson, H. Victor Crawford and The Chase National Bank of the City of New York as Executors of the Last Will and Testament of Frank C. Hart, deceased, The Commercial National Bank and Trust Company of New York, as General Guardian of the estates of Frank Charles Hart, Jr., James A. Hart and Kerry Ann Hart, infants, directing them and each of them to show cause before the Surrogate's Court of New York County to be held at the Hall of Records in said County on the 26th day of February, 1943, at 10 o'clock in the forenoon of that day, why this Court should not fix and determine the compensation to be paid to Davies, Auerbach, Cornell & Hardy, for the services rendered by said firm and its predecessor firm, Davies, Auerbach & Cornell, as attorneys in connection with the estate of Frank C. Hart, in the sum of $8,000, plus disbursements of $2.60, and why this Court should not direct that such compensation be paid from the estate generally, or from the respective interests therein of said infants, Frank Charles Hart, Jr., James A. Hart and Kerry Ann Hart, and why said petitioner should not have such other and further relief as to this Court might seem just and proper, and the said citation having been returned with proof of due service thereof on Marion A. Hart, Frank Charles Hart, Jr., an infant over the age of fourteen years, James A. Hart, an infant over the age of fourteen years, Kerry Ann Hart, an infant under the age of fourteen years, Herbert V. Peterson, H. Victor Crawford and The Chase National Bank of the City of New York as Executors of the Last Will and Testament of Frank C. Hart, deceased, The Commercial National Bank and Trust Company of New York, as General Guardian of the estates of Frank C. Hart, Jr., James A. Hart and Kerry Ann Hart, infants, and an affidavit of legal services having been filed in support of the

said petition; and the said Lawrence R. Condon having filed a petition and an amended petition and a citation having been thereupon issued pursuant to statute directed to Marion A. Hart, Marion A. Hart, as Testamentary Guardian of the property of Frank C. Hart, Jr., James A. Hart and Kerry Ann Hart, infants, Frank C. Hart, Jr., an infant son of decedent, James A. Hart, an infant son of decedent, Kerry Ann Hart, an infant daughter of decedent, Herbert V. Peterson, as Executor of the Will of Frank C. Hart, deceased, H. Victor Crawford, as Executor of the Will of Frank C. Hart, deceased, and The Chase National Bank of the City of New York, as Executor of the Will of Frank C. Hart, deceased, citing them and each of them to show cause why the Court should not fix and determine the compensation to be paid to the said Lawrence R. Condon for services described in the said petition and directing that such compensation be paid from the general estate of Frank C. Hart, one-half in cash and the remaining one-half in stock of the Hartol Products Corporation, and the said citation having been returned with proof of the due service thereon Marion A. Hart, Marion A. Hart, as Testamentary Guardian of the property of Frank C. Hart, Jr., James A. Hart and Kerry Ann Hart, infants, Frank C. Hart, Jr., an infant son of decedent, James A. Hart, an infant son of decedent, Kerry Ann Hart, an infant daughter of decedent, Herbert V. Peterson, as Executor of the Will of Frank C. Hart, deceased, H. Victor Crawford, as Executor of the Will of Frank C. Hart, deceased, and The Chase National Bank of the City of New York, as Executor of the Will of Frank C. Hart, deceased, and an affidavit of services verified by H. Victor Crawford, Esq. in behalf of Messrs. Crawford & Sprague, setting forth the services rendered by said firm to said Executors having been filed herein, and the affidavit of Thomas A. Ryan verified the 16th day of June, 1943 having been filed herein in behalf of Milbank, Tweed & Hope, showing the services by the said firm to said Executors, and John F. Keating, Esq. having been appointed as

Special Guardian for the said three infants for the purpose of representing them in all three of the above entitled proceedings, it is

ORDERED that the above entitled proceedings be and the same hereby are consolidated;

And the said Special Guardian having filed his report herein and the proofs and the allegations of the parties having been heard and three separate decisions in writing of the Surrogate having been duly filed herein and no objections to the said accounts having been filed except as set forth in said Special Guardian's report and the matter having been duly adjourned to this date;

As to the Petition of Lawrence R. Condon.

IT IS ORDERED, ADJUDGED AND DECREED:

1. That the application of the said Lawrence R. Condon for the payment of attorney's fees out of the funds of the Estate of the said Frank C. Hart be and it hereby is denied.

2. That the said application is also denied and any allowance for attorney's fees for the said Lawrence R. Condon denied out of the general estate of the testator or out of the shares in said estate of Frank C. Hart, Jr., James A. Hart, and Kerry Ann Hart, the children of Frank C. Hart, deceased.

As to the Petition of Sydney G. Soons.

IT IS ORDERED, ADJUDGED AND DECREED:

1. That the compensation of Messrs. Davies, Auerbach, Cornell & Hardy is hereby fixed in the sum of $6,000

to be paid out of the funds of the said estate as hereinafter provided.

2. That Messrs. Davies, Auerbach, Cornell & Hardy transfer to each of the said infants, namely, Frank C. Hart, Jr., James A. Hart and Kerry Ann Hart, nine and eight tenths (9-8/10) shares of the capital stock of Hartol Products Corporation by transferring and delivering the same to Marion A. Hart as Testamentary Guardian of the Estate of the said infants.

3. That the sum of One hundred fifty-six and 80/100 Dollars ($156.80) on account of dividends received by the said firm on the said shares of stock directed to be transferred to each of said infants be credited against the claim of Messrs. Davies, Auerbach, Cornell & Hardy for attorneys' fees against the shares of each of the said infants of the Estate funds.

As to Petition for the Settlement of the Executors' Account and Other Relief.

And it appearing that the said Executors have collected $1,218.75 since the date of the said account and have paid to the City Treasurer the sum of $61.85 referred to in Schedule E-1 of the said account as shown by the affidavit of Esmond B. Gardner sworn to December 21, 1943, said Surrogate, after having examined the said accounts, now here finds the state and condition of the said accounts to be as stated and set forth in the following summary statement thereof made by the said Surrogate as judicially settled and adjusted by him to be recorded with and taken to be a part of the decree in this matter, to wit:

SUMMARY.

The following is a summary statement of the Executors' account of the General Estate:

Combined Account.

Charges:

Amount shown by Schedule A (Property on hand July 18, 1941, the date of the last accounting)	$629,453.44	
Amount shown by Schedule A-1 (Additional Property received)	47,992.06	
Amount shown by Schedule A-2 (Increases)	201,683.25	
Amounts received since date of account as shown by affidavit of Esmond B. Gardner	1,218.75	
Total charges		$880,347.50

Credits:

Amount shown by Schedule B (Decreases in Capital)	$ -0-	
Amount shown by Schedule B-1 (Uncollectible items)	-0-	
Amount shown by Schedule C (Administration expenses ~~p~~aid)	176,557.85	
Amount shown by Schedule E (Creditors' claims actually paid)	225,809.38	
Amount shown by Schedule F (Legacies or distributive shares actually paid)	411,786.35	
Amounts disbursed since date of account as shown by affidavit of Esmond B. Gardner	61.85	
Total credits		$814,215.43
Balance on hand December 17, 1943, as shown by Schedule H of the said account as amended by affidavit of Esmond B. Gardner		$ 66,132.07

DEATH ACTION SETTLEMENT.

Summary.

The following is a summary statement of the Executors' account of the Death Action Settlement:

Charges:

Amount of balance on hand July 18, 1941, date of the previous accounting, per Schedule M	$ 855.00	
Amount of Receipts, per Schedule M	1,000.00	
Total charges		$1,855.00
Credits:		
Amount of payment to beneficiaries, per Schedule M		1,000.00
Balance on hand Feb. 23, 1943, per Schedule M which is reserved for the payment of commissions in the amount of $855 as shown by Schedule K		855.00

And it appearing that the said Executors have duly accounted for all of the monies and property of the said estate which have or should have come into their hands as such Executors and the said accounts having been allowed by the said Surrogate and the said summary statements thereof having been made as above and herewith recorded, it is hereby

ORDERED, ADJUDGED AND DECREED that the said accounts of the said Executors be and the same hereby are judicially settled and allowed as filed herein and supplemented by the said affidavit of Esmond B. Gardner.

SUMMARY STATEMENT OF DEPOSITARY'S ACCOUNT.

The following is a summary statement of the account of The Chase National Bank of the City of New York, as depositary as hereinabove described:

SUMMARY.

The following is a summary statement of the depositary's account for proceeds of certain insurance policies on the life of Frank C. Hart, deceased.

Charges:		
Amount of receipts as shown by Schedule N	$174,461.76	
Total charges		$174,461.76
Credits:		
Amount of payments for expenses as shown by Schedule O	$ 333.81	
Amount of payments pursuant to paragraph "First" (a), (b) and (c) of the Compromise Agreement, as amended, as shown by Schedule O	173,137.49	
Total credits		173,471.30
Balance on hand February 23, 1943 as shown by Schedule P		$ 990.46

And it appearing from the affidavit of V. L. Banker, verified July 13, 1943, that the said depositary has a claim against The Mutual Life Insurance Company of Newark in the sum of $16,111.79 for interest on monies held by the said Insurance Company representing the proceeds of the

policies numbered 1203896 and 1429358 issued by the said Insurance Company for the period from the date of the death of the said decedent to the 12th day of January, 1943.

And it appearing that the said depositary has fully accounted for all of the insurance monies which have come or should have come into its hands as such depositary and the said account, as supplemented by the said affidavit of V. L. Banker, having been allowed by the said Surrogate and the said summary statement having been made as above and herewith recorded, it is hereby

ORDERED, ADJUDGED AND DECREED that the said account of The Chase National Bank of the City of New York as such depositary be and it hereby is judicially settled and allowed as filed and as supplemented by the affidavit of V. L. Banker, verified July 13, 1943.

And it appearing that the said Mathilde Marguet, as Executrix of the Last Will and Testament of Louis G. Marguet, and the said Maxwell C. Carlin, referred to in the citation and petition herein as M. C. Carlin, have adjusted their differences with respect to the disposition of the claim of the said estate of Louis G. Marguet against the estate of Frank C. Hart, deceased, as provided in the stipulation hereinabove referred to, and that the income tax obligations of the Executors for the years 1942 and 1943 have not been determined and that expense will be incurred in connection with the insurance claim hereinafter referred to and that to meet such possible obligations and such expenses it is advisable to reserve from distribution the sum of Twelve thousand dollars ($12,000.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

1. That the attorney's fees of Messrs. Crawford and Sprague are hereby fixed in the sum of Fifteen thousand

four hundred dollars ($15,400.00), (Seventeen thousand five hundred dollars ($17,500.00) as to Marion Alexander Hart) the balance remaining unpaid on account of the said fee, in the sum of Seven thousand five hundred and fifty dollars ($7,550.00), to be paid out of estate funds as hereinafter provided.

2. That the compensation of Messrs. Milbank, Tweed & Hope is hereby fixed in the sum of Twelve thousand dollars ($12,000.00), to be paid out of estate funds as hereinafter provided.

3. That H. Victor Crawford transfer to the said infants, Frank C. Hart, Jr., James A. Hart and Kerry Ann Hart in equal shares sixty eight and six tenths (68-6/10) shares of the capital stock of Hartol Products Corporation by transferring the same to Marion A. Hart as Testamentary Guardian of their estates and that the sum of One thousand ninety seven and 60/100 dollars ($1,097.60) representing dividends received by him thereon, be credited against his claim for commissions against the said infants' share in the Estate funds.

4. That Herbert V. Peterson transfer to the said infants, Frank C. Hart, Jr., James A. Hart and Kerry Ann Hart in equal shares sixty eight and six-tenths (68-6/10) shares of the capital stock of Hartol Products Corporation by transferring the same to Marion A. Hart as Testamentary Guardian of their estates and that the sum of One thousand ninety seven and 60/100 dollars ($1,097.60) representing dividends received by him thereon, be credited against his claim for commissions against the said infants' shares in the Estate funds.

5. That Messrs. Crawford and Sprague transfer to the said infants, Frank C. Hart, Jr., James A. Hart and Kerry Ann Hart in equal shares, seventy (70) shares of the capi-

tal stock of Hartol Products Corporation by transferring the same to Marion A. Hart as Testamentary Guardian of their estates and that the sum of One thousand one hundred twenty dollars ($1,120.00) representing dividends received by them thereon be credited against their claim for attorneys' fees against the said infants' share of the Estate funds.

6. That the commissions of each of the said individual Executors are hereby allowed in the sum of Eighteen thousand eight hundred thirty four and 50/100 dollars ($18,834.50) as shown by Schedule K of the account plus the sum of $24.38 being commissions on the amounts ($1,218.75) received since the date of the account or a total to each of $18,858.88, and the commissions of The Chase National Bank of the City of New York are hereby allowed in the sum of Eighteen thousand eight hundred seventy one and 74/100 dollars ($18,871.74) as shown by Schedule K of the account plus the sum of $24.38 being commission on the amounts ($1,218.75) received since the date of the account or a total of $18,896.12.

7. That the sum of One Thousand Five Hundred ($1500.00) ..... Dollars is hereby allowed to John F. Keating as compensation for his services as Special Guardian herein.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said executors and depositary consolidate the cash balances in their hands as set forth in their respective accounts as amended by the said affidavit of Vincent L. Banker and the amounts to be received from the Testamentary Guardian of the said infants as hereinafter directed,

set aside a reserve and make the following payments of cash to be allocated as set forth below:

Name of Payee	Amount	Allocation: Mrs. Hart's Share	Allocation	Allocation: Hart Infants' Shares
John F. Keating	$1,500.00	$ 450.00		$ 1,050.00
Milbank, Tweed & Hope	12,000.00	3,600.00		8,400.00
Crawford & Sprague	2,532.24	759.67		1,772.57
Crawford & Sprague	7,550.00		$6,650.00	
		900.00	1,120.00	5,530.00
Davies, Auerbach, Cornell & Hardy	2,303.00		1,850.00	
		453.00	470.40	1,379.60
Herbert V. Peterson	8,065.88		7,601.22	
		464.66	1,097.60	6,503.62
H. Victor Crawford	8,065.88		7,601.22	
		464.66	1,097.60	6,503.62
The Chase National Bank of the City of New York	18,896.12	5,668.84		13,227.28
Mathilde Marguet as Executrix of the Last Will & Testament of Louis G. Marguet, deceased	25.00)	7.50		17.50
M. C. Carlin	73.38)	22.01		51.37
Reserve	12,000.00	3,600.00		8,400.00
Totals	$73,011.50	$16,390.34		$52,835.56
	Credits against Infants' shares			3,785.60
				$56,621.16

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Executors and Depositary divide the balances found as above remaining consisting of cash in the sum of $62,447.53 and 79 shares of stock of Hartol Products Corporation in a 30% share for Marion A. Hart consisting of $18,734.26 cash and 23.7 shares of Hartol Products Corporation capital stock and a 30% interest in proprietary certificate No. 257 issued by the Essex County Country Club of West Orange, New Jersey and a 70% share consisting of $43,713.27 and 55.3 shares of Hartol Products Corporation capital stock and a 70% interest in proprietary certificate No. 257 issued by the Essex County Country Club of West Orange, New Jersey.

And it further appearing that the amount of cash to be paid or reserved out of the said infants shares is $52,835.56 and that as shown above the amount of cash on hand belonging to the shares of the said infants is $43,713.27 and that the difference of $9,122.29 represents an overpayment of the said Executors to the said infants on account of their distributive shares, it is

ORDERED, ADJUDGED AND DECREED that each of the said infants repay forthwith to the said Executors the sum of Three Thousand Forty and 76/100 Dollars ($3,040.76) (Frank C. Hart, Jr. to repay $3,040.77); and Marion A. Hart as Testamentary Guardian of the estates of each of the said infants is hereby directed to pay forthwith to The Chase National Bank of the City of New York, H. Victor Crawford and Herbert V. Peterson as Executors of the Last Will and Testament of Frank C. Hart deceased, the sum of Three Thousand Forty and 76/100 Dollars ($3,040.76) ($3,040.77 to be paid out of the funds of Frank C. Hart, Jr.) on behalf of each of the said infants of the funds held by her as such Testamentary Guardian for each of the said infants making a total of $9,122.29 to be paid by her out of the funds of the said infants, and it is further

ORDERED, ADJUDGED AND DECREED that the making of the said aggregate payments of $9,122.29 by the said Testamentary Guardian is a condition precedent to the transfer of the shares of Hartol Products Corporation hereinabove directed to be made by Messrs. Crawford & Sprague; Davies, Auerbach, Cornell & Hardy; H. Victor Crawford and Herbert V. Peterson; and it is further

ORDERED, ADJUDGED AND DECREED that the said Executors after making the foregoing payments and reservation pay over and transfer the balances of the shares of Marion Alexander Hart and of the said infants as follows:

To Marion A. Hart, the sum of $2,343.92 in cash and Twenty-three and Seven Tenths (2-7/10) shares of the capital stock of Hartol Products Corporation and a 30% interest in proprietary certificate No. 257 issued by the Essex County Country Club of West Orange, New Jersey.

To Frank C. Hart, Jr., by paying and transferring the same to Marion A. Hart, his said Testamentary Guardian, Eighteen and Forty-three Hundredths (18.43) shares of the capital stock of Hartol Products Corporation and a 23⅓% interest in proprietary certificate No. 257 issued by Essex County Country Club of West Orange, New Jersey.

To Kerry Ann Hart, by paying and transferring the same to Marion A. Hart, her said Testamentary Guardian, Eighteen and Forty-four Hundredths (18.44) shares of the capital stock of Hartol Products Corporation and a 23⅓% interest in proprietary certificate No. 257 issued by Essex County Country Club of West Orange, New Jersey.

To James A. Hart, by paying and transferring the same to Marion A. Hart, his said Testamentary Guardian, Eighteen and Forty-three one hundredths (18.43) shares of the capital stock of Hartol Products Corporation and a 23⅓% interest in proprietary certificate No. 257 issued

by Essex County Country Club of West Orange, New Jersey; and it is further

ORDERED, ADJUDGED AND DECREED that the said executors and The Chase National Bank of the City of New York, as depositary under the said compromise agreement dated the 31st day of December, 1941, as amended by a certain agreement dated December 7, 1942, and approved by the Surrogate's Court of New York County by decree dated December 20, 1942, be and it hereby is authorized to bring suit against the said Mutual Life Insurance Company of Newark, New Jersey, on account of the said claim for interest on the policies numbered 1203896 and 1429358 issued by the said Insurance Company and in connection therewith, the executors and the said depositary are hereby authorized to take such proceedings as to them may seem proper, advisable or expedient, in court or otherwise to compromise, adjust and/or to submit to arbitration the said claim and in connection therewith to pay out of the said reserve of $12,000.00 hereinabove provided, its reasonable expenses including counsel fees, and it is further

ORDERED, ADJUDGED AND DECREED that the said executors pay over the balance of the $5,000. deposit referred to in the petition herein held by them for the purpose of paying the amount of any estate taxes which might be found to be payable by the said Muriel Constance Warburg be paid over, as follows:

To Emmanuel Lewin the sum of $1,250.

To Muriel Constance Warburg the sum of $3,750, and it is further

ORDERED, ADJUDGED AND DECREED that the foregoing payments to Emmanuel Lewin and Muriel Constance Warburg are made subject to the indenmity provisions of a certain instrument dated October 31, 1943 made by the said Emmanuel Lewin and Muriel Constance Warburg in favor

of the said Executors, which instrument is made a part of this decree; and it is further

ORDERED, ADJUDGED AND DECREED that the said Herbert V. Peterson, H. Victor Crawford and The Chase National Bank of the City of New York, individually and as Executors of the Last Will and Testament of Frank C. Hart, deceased, be and they hereby are released, relieved and forever discharged of and from all liability, accountability or responsibility with respect to the said account, and as to any matter or thing contained in the said account or embraced in this decree, except, however, as to the liability of the said Executors to account for the reserve of $12,000 remaining in their hands, and it is further

ORDERED, ADJUDGED AND DECREED that The Chase National Bank, as such Depositary be and it hereby is released, relieved and forever discharged of and from any and all liability, accountability, or responsibility with respect to its said account as such Depositary and as to any matter or thing contained in said account or embraced in this decree except as to its liability to account for the amount of any recovery which may be made against the said Mutual Life Insurance Company of Newark, on account of its said claim.

JAMES A. FOLEY,
Surrogate.

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 186

MARION A. HART; FRANK C. HART, JR.; JAMES A. HART, an infant by Marion A. Hart, his Guardian; KERRY ANN HART, an infant by Marion A. Hart, her Guardian; and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Depositary for Marion A. Hart, Frank C. Hart, Jr., James A. Hart and Kerry Ann Hart,

Petitioners,

against

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEWARK, NEW JERSEY, a corporation of the State of New Jersey,

Respondent.

BRIEF OF RESPONDENT ON PETITION FOR CERTIORARI

JAMES M. SNEE,
Counsel for Respondent,
1 Wall Street,
New York, N. Y.

LITTLEFIELD & MARSHALL,
Attorneys for Respondent,
1 Wall Street,
New York, N. Y.

APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO. 4-3033

INDEX

PAGE

A. STATEMENT 1

General 1

Proceedings Below 2

Questions Presented 3

Summary of Argument 3

B. ARGUMENT 4

I. The complaint states facts constituting a defense against the cause of action alleged therein and is thus subject to dismissal under Rule 12(b)6 4

II. The decision in the instant case is not in conflict with the decisions of the Circuit Court of Appeals for the Tenth Circuit cited in Point II of petitioners' brief 6

III. The complaint was properly dismissed because:

(a) The petitioners are estopped to attack the decree of the Surrogate's Court dated December 30, 1942, which negatives their claim for additional interest 7

(b) The decree is entitled to a presumption of regularity and is not subject to collateral attack by the petitioners 7

(c) The petitioners cannot split their single cause of action upon the policies by bringing a separate action for the interest 9

PAGE

(d) The petitioners' remedy if they believe that respondent has disobeyed the decree is to apply to the Surrogate's Court for relief 9

APPENDIX 11

Table of Cases

Berry, et al. *v.* Chrysler Corp., 150 F. (2nd) 1002..... 4
Bowles *v.* Capitol Packing Co., 143 F. (2nd) 87..... 6
Continental Collieries, Inc., *v.* Shober, Jr., 130 F. (2nd) 631 4
Crane *v.* Craig, Matter of, 230 N. Y. 452..... 9
Davis, Trustee, *v.* Mabee, et al., 32 F. (2nd) 502..... 9
Gossard *v.* Gossard, 149 F. (2nd) 111..... 6
Jones *v.* Miller, et al., 2 F.R.D. 479..... 5
Leimer *v.* State Mutual Life Assurance Co. of Worcester, Mass., 108 F. (2nd) 302 5
Zeligson *v.* Hartman-Blair, Inc., et al., 135 F. (2nd) 874 6

Other Authorities

Rules of Civil Procedure:
Rule 1 5
Rule 8(c) 3, 4, 6
Rule 9(f) 6
Rule 12(b)6 .....3, 4, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 186

MARION A. HART; FRANK C. HART, JR.; JAMES A. HART, an infant by Marion A. Hart, his Guardian; KERRY ANN HART, an infant by Marion A. Hart, her Guardian; and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Depositary for Marion A. Hart, Frank C. Hart, Jr., James A. Hart and Kerry Ann Hart,

Petitioners,

against

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEWARK, NEW JERSEY, a corporation of the State of New Jersey,

Respondent.

BRIEF OF RESPONDENT ON PETITION FOR CERTIORARI

A

STATEMENT

General

The opinion of Judge Clark contains a statement of the case at pages 50-59 of the Record. In the interest of brevity the respondent will rest on that statement, merely

emphasizing a few points and calling attention to certain statements in the petition or opposing brief deemed inaccurate.

Although the petitioners brought suit below to collect legal interest on two life insurance policies issued by the respondent, only one of the petitioners was named as a beneficiary in either policy. Such rights as the petitioners have flow from a decree of the Surrogate's Court of New York County dated December 30, 1942 (R. 24-32) entered pursuant to an agreement of compromise between the petitioners who were adverse litigants in said Surrogate's Court (R. 29).

The petitioners' statement (Petition p. 2) leaves the inference that the respondent was at fault in holding back the face amount of the policies for 7 years, thus having use and benefit of the proceeds for that period. The fact is that the delay in payment was due to disputes among the petitioners themselves (R. 59) which were only resolved by said compromise agreement and the decree of December 30, 1942, with which respondent promptly complied (R. 10).

Proceedings Below

The Circuit Court of Appeals in affirming the judgment of the District Court dismissing the complaint (reported in 166 F. (2nd) 891) held, among other things, that the decree of the Surrogate's Court dated December 30, 1942, approving an agreement of compromise, between the insured's wife and children and the executors of the insured's estate, by which the proceeds of the life insurance policies, "together with all interest and post mortem dividends allowed by any insurance company", were to be paid to the petitioner bank as depositary for the

benefit of insured's wife and children was not subject to collateral attack in federal court by the wife and children and bank in seeking recovery of greater interest than was allowed by the respondent insurance company and that the petitioners, some of whom depended for their title to the proceeds of the policies on said decree, were estopped to attack it. The Court also held against the petitioners on the more basic ground that the decree was entitled to a presumption of regularity until negatived by a clear showing (absent here) of adequate grounds for collateral attack.

Questions Presented

With due respect for the petitioners' choice of language setting forth the "Questions Presented", we believe that both questions as now phrased beg the issue and we submit that the real questions before this Court are:

1. Could the Court below properly find that it affirmatively appears on the face of the complaint herein that, by reason of *res judicata* or estoppel, petitioners are entitled to no relief and that, therefore, notwithstanding Rule 8(c) of the Rules of Civil Procedure, the complaint should be dismissed under Rule 12(b)6?

2. Are the petitioners estopped from seeking relief in the federal court?

Summary of Argument

I. The complaint states facts constituting a defense against the cause of action alleged therein and is thus subject to dismissal under Rule 12(b)6.

II. The decision in the instant case is not in conflict with the decisions of the Circuit Court of Appeals for the Tenth Circuit cited in Point II of petitioners' brief.

III. The complaint was properly dismissed because

(a) The petitioners are estopped to attack the decree of the Surrogate's Court dated December 30, 1942, which negatives their claim for additional interest.

(b) The decree is entitled to a presumption of regularity and is not subject to collateral attack by the petitioners.

(c) The petitioners cannot split their single cause of action upon the policies by bringing a separate action for the interest.

(d) The petitioners' remedy if they believe that respondent has disobeyed the decree is to apply to the Surrogate's Court for relief.

B

ARGUMENT

I

The complaint states facts constituting a defense against the cause of action alleged therein and is thus subject to dismissal under Rule 12(b)6.

Where a complaint on its face shows that it is barred by an affirmative defense it is subject to a motion to dismiss under Rule 12(b)6 of the Rules of Civil Procedure and Rule 8(c) in such cases does not apply. *Berry et al.* v. *Chrysler Corp.*, 150 F. (2nd) 1002 (C.C.A. 6, 1945), (defect of bar of Statute of Limitations).

See *Continental Collieries, Inc.*, v. *Shober, Jr.*, 130 F. (2nd) 631 (C.C.A. 3, 1942), (defect of bar of Statute of Frauds).

See *Leimer* v. *State Mutual Life Assurance Co. of Worcester, Mass.*, 108 F. (2nd) 302 (C.C.A. 8, 1940), (defect of bar of Statute of Limitations).

See *Jones* v. *Miller et al.*, 2 F.R.D. 479 (D.C.W.D. Pa., 1942), (defect of bar of *res judicata*).

In the instant case it appears on the face of the complaint that the cause of action attempted to be alleged therein is barred by various affirmative defenses arising chiefly out of proceedings in the Surrogate's Court of New York County. These defenses are discussed under III of respondent's brief.

It would be a waste of time, therefore, to require the defendant to file an answer raising the defense of *res judicata,* as petitioners argue (or any other defense), and thereafter decide the issue by motion or pre-trial procedure. To do so would be to disregard the fundamental purpose of the Rules as embodied in Rule I, which reads as follows:

> "These rules * * *. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

The cases cited by petitioners in Point I of their brief are not in conflict with the decision of the Circuit Court of Appeals in the instant case. As appears from the opinion of Judge Clark the compromise agreement and the decree of December 30, 1942, provided the Court with a sufficient factual basis for the decision rendered.

II

The decision in the instant case is not in conflict with the decisions of the Circuit Court of Appeals for the Tenth Circuit cited in Point II of petitioners' brief.

An examination of the respective opinions in the cases of *Zeligson* v. *Hartman-Blair, Inc., et al.*, 135 F. (2nd) 874 (C.C.A. 10, 1943) and *Bowles* v. *Capitol Packing Co.*, 143 F. (2nd) 87 (C.C.A. 10, 1944), cited in support of petitioners' contention to the contrary, shows that in neither case did the fatal defect appear in the pleadings.

In the *Zeligson* case the prior judgment did not appear on the face of the complaint and in the *Bowles* case the Court merely held that a party may not attempt to prove estoppel at the trial when that defense has not been pleaded.

Neither decision, therefore, is in conflict with the decision in the instant case where the facts showing an estoppel were part of complaint herein.

On the contrary, the decision in *Gossard* v. *Gossard*, 149 F. (2nd) 111 (C.C.A. 10, 1945), shows that the Circuit Court of Appeals for the Tenth Circuit is in accord with the decision in the instant case. The *Gossard* case involved another affirmative defense mentioned in Rule 8(c) of the Rules of Civil Procedure, namely, the Statute of Limitations. In its opinion the Court pointed out that under Rule 9(f) allegations of time and place become material (contrary to the common law rule of immateriality) and ruled that since the complaint showed on its face that the cause of action was barred by the Statute of Limitations, the complaint was subject to dismissal under Rule 12(b)6.

III

The complaint was properly dismissed.

(a) The petitioners are estopped to attack the decree of the Surrogate's Court dated December 30, 1942, which negatives their claim for additional interest.

This decree was entered in proceedings (R. 24-28) seeking among other things the approval of a compromise agreement between the wife, the children and the executors of the insured pursuant to which the proceeds of the life policies here involved (which named the wife as beneficiary), "together with all interest and post mortem dividends allowed by any of the insurance companies" were to be paid to the petitioner bank as depositary for the benefit of the individual petitioners. The source of the title of the bank and the children thus depended upon the very decree which they attempted to attack by demanding greater amounts of interest than that allowed by the respondent. As the Court below pointed out the petitioners are estopped from doing this.

(b) The decree is entitled to a presumption of regularity and is not subject to collateral attack by the petitioners.

The petitioners attempt to avoid the effect of the decree by arguing that the Surrogate's Court had no jurisdiction to pass upon the amount of interest and, in effect, that all reference to interest in the decree is surplusage.

The Surrogate's decree was entered upon a consolidation of three different proceedings before him; namely, 1) proceeding to compel delivery of specific property, 2) judicial settlement by the Executors of their account, and 3) approval of a Compromise Agreement (R. 24-28).

The question of jurisdiction was carefully and exhaustively considered by the Court below and the force of it's decision, based on a consideration of the statutory and case law of New York, that the Surrogate's Court did have jurisdiction to, and did, pass upon the question of interest, is not overcome by the arguments of or the cases cited by the petitioner, as the Court's opinion points out.

The petitioners have ignored the New York statutes discussed in the opinion of the Court below which bear on the jurisdiction of the Surrogate's Court and rely on decisions which do not meet the factual situation in the instant case, being largely cases where jurisdiction has been declined because the question litigated was not involved in the settlement of an estate.

Petitioners also refer to the ex parte decree of December 23, 1943 (appendix B of petitioners' brief). This document, entered almost a year after the decree annexed to the complaint, was not a part of the record before either the District Court or the Circuit Court of Appeals but was dragged into the petition for rehearing to the Circuit Court of Appeals. As this decree was entered ex parte without the knowledge of respondent and the paragraphs authorizing suit against the respondent are based solely on some undisclosed statements in affidavit form made by an official of the petitioner-bank it is difficult to see how, even if it had been properly before the Courts below, the decree could have had any probative value in showing that the Surrogate's Court did not determine the amount of interest due to the petitioners or that it did not have jurisdiction to decide such issue.

(c) The petitioners cannot split their single cause of action upon the policies by bringing a separate action for the interest.

There being no provision for the payment of interest in the policies (R. 13-18), any right to interest must arise as a penalty or damages for default in payment of the face amount of the policies. In such a case the interest is regarded not as a part of the debt but as a mere incident to it and the receipt of the face amount or principal "bars a subsequent claim for the interest for the reason that in such cases interest being a mere incident, cannot exist without the debt, and the debt being extinguished the interest must necessarily be extinguished also". *Matter of Crane* v. *Craig*, 230 N. Y. 452, 461 (1921), citing *Stewart* v. *Barnes*, 153 U. S. 456 (1894).

It appears from the complaint herein (R. 8, paragraphs 29-32; R. 10, paragraphs 43-46) that the respondent paid the petitioners the face amount of both policies in suit and in addition certain additional sums for interest and dividends. In such case, in the absence of allegations negativing the effect of such payment and receipt, the petitioners are clearly within the rule of *Stewart* v. *Barnes* (*supra*) and *Matter of Crane* v. *Craig* (*supra*) and the complaint was properly dismissed. See also *Davis, Trustee,* v. *Mabee, et al.*, 32 F. (2nd) 502, 505 (C.C.A. 6, 1929); certiorari denied 280 U. S. 580 (1929).

(d) The petitioners' remedy if they believe that respondent has disobeyed the decree is to apply to the Surrogate's Court for relief.

As the opinion below points out, the petitioners' disclaimer of any reliance on the decree made it unnecessary for the Court to attempt an interpretation of the decree

beyond the points covered by the opinion (R. 59). Therefore, if the provision in the decree respecting interest means anything more than a direction to the respondent to pay the proceeds "with interest, if any" and the petitioners desire a ruling on this point, their remedy is to raise the question in the Surrogate's Court in an appropriate proceeding. Their appeal to the federal courts characterized by the Court below as "shopping for another forum" (R. 59) is clearly contrary to the policy of the State of New York of concentrating all matters affecting the settlement of decedents' estates in the Surrogate's Court.

It is respectfully submitted that the petition for certiorari should be denied.

JAMES M. SNEE,
Counsel for Respondent.

BRONSON GODDARD,
On the Brief.

APPENDIX

Relevant parts of certain of the rules of the Federal Rules of Civil Procedure cited in the respondent's brief are as follows:

"Rule 8. General Rules of Pleading.

(c) In pleading to a preceding pleading, a party shall set forth affirmatively * * * estoppel * * * *res judicata* * * * and any other matter constituting an avoidance or affirmative defense. * * *"

"Rule 9. Pleading Special Matters.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter."

"Rule 12. Defenses and Objections—
When and How Presented—
By Pleading or Motion—
Motion for Judgment on Pleadings.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. * * *."

Rule 12(b)6 was amended, effective March 19, 1947, by the addition of the following:

"If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state

a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."